The People's Insurance Co (M) Bhd v Ting Tiew Kiong

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–02–569 OF 2005

TENGKU BAHARUDIN SHAH, RAUS SHARIF AND ABDULL HAMID EMBONG JJCA

13 JULY 2007

Insurance Law — Motor insurance — Claims — Appeal — Personal Injury — Liability under policy — Finding of facts by trial judge — A passenger carried by reason of or in pursuance of contract of employment — Whether appellate interference warranted — Best available evidence — Adverse inference — Road Transport Act 1987 s 96(1) — Evidence Act 1950 s 114(g)

On 5 August 1995, the plaintiff/respondent was travelling as a passenger in a car, bearing registration QSA 8809 owned and driven by one Toh Kie Hung, that swerved off the road and plunged into a ravine. The plaintiff/respondent sustained serious injuries while Toh Kie Hung ('deceased'), died. The plaintiff/respondent sued the administratrix of the estate of the deceased in the Session Court at Sibu, Sarawak claiming damages for personal injuries suffered as a result of negligence of the deceased and obtained judgment after a full trial. The judgment was upheld by the High Court upon appeal and the plaintiff/respondent became entitled to be paid the sum of RM570,766.35 together with interest at the rates specified in the judgment which the deceased's estate failed to pay.

The plaintiff/respondent then filed this suit against the defendant/appellant, an authorised insurer who had on 5 January 1995, issued insurance policy No SB94DY001063/MPT/ROO ('the policy') to the deceased. It was the plaintiff's case that the policy covered the plaintiff/respondent as he was 'a passenger carried by reason of or in pursuance of contract of employment'. The defendant/appellant denied any liability and alleged that the plaintiff/respondent was, at the time of the accident, a passenger in the car of the deceased being carried therein other than by reason of or in pursuance of a contract of employment.

The entire action turned on a sole issue, namely whether the plaintiff/respondent was a passenger in the deceased's car by reason of or in pursuance of a contract of employment. If he was, the defendant/appellant was liable to satisfy the judgment obtained by the plaintiff/respondent against the estate of the deceased. If he was not, the defendant/appellant would not be liable. The trial judge found in favour of the plaintiff/respondent and the defendant/appellant appealed against the trial judge's findings.

Held, dismissing appeal with costs:

(1) It is settled law that the contract of employment referred to in the clause is not

confined to the employment of the insured. It is also applicable to any person being carried in pursuance of a contract of employment with another employer (see *Izzard v Universal Insurance* [1937] AC 733; *Tan Keng Hong & Anor v Fatimah binti Abdullah & Ors* [1974] 1 MLJ 156; *United Oriental Assurance Sdn Bhd v Lin Eng Yew* [1991] 3 MLJ 429 and *Union Insurance (M) Sdn Bhd v Chan You Yuong* [1999] 1 MLJ 593). These cases clearly demonstrate that the contract of employment referred to in the clause is not confined to the employment of the insured. It is possible for a passenger to come within this clause even if employed by a third party (see para 14).

(2) The court did not detect any error on the findings of the learned trial judge. The defendant's case was that the plaintiff merely took a lift from the deceased's car to Sibu. But the defendant did not call any witness. Thus, there was only one version of evidence before the learned trial judge ie the plaintiff's version. Therefore, there was no conflict of evidence in this case. The question before the learned trial judge was whether the testimony of the two witnesses called by the plaintiff was sufficient for the plaintiff to prove his case. The learned trial judge found it to be sufficient (see para 17).

(3) The court was entirely in agreement with the learned trial judge's reasoning. He had gone through the oral testimony of the plaintiff's witnesses in detail. He found the witnesses' version of the events had withstood the acid test of cross-examination. He accepted their evidence and gave his reasons for doing so. The court did not see his reasoning in any way tainted with lack of judicial appreciation of the evidence placed before him. Nor did he commit any fundamental misdirection or was wrong in his conclusion or inference to justify this court's intervention. Thus, there was no reason to disturb the findings of fact by the learned trial judge (see para 18).

(4) In conclusion, the court was of the view that the findings of the learned trial judge that the plaintiff at the time of the accident was a passenger in the deceased's car by reason of or pursuant to a contract of employment were findings of facts. There was no dearth of authority dealing with the approach what the appellate court should take when reviewing the findings of facts by the trial court. The settled principle of law is that, it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appeared that these findings were clearly wrong. And it was even more undesirable to do so where the conclusion reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the trial judge who had seen them and judged their honesty and accuracy (see Federal Court case of *China Airlines Ltd v Malta Air Corporation Sdn Bhd & Another Appeal* [1996] 3 CLJ 163). The court adopted the same principle in deciding this appeal (see para 21).

[Bahasa Malaysia summary

Pada 5 Ogos 1995, plaintif/responden semasa dalam perjalanan sebagai penumpang dalam sebuah kereta dengan pendaftaran QSA 8809 yang dimiliki dan dipandu oleh Toh Kie Hung, yang telah membelok secara tiba-tiba dan terbabas ke dalam gaung. Plaintif/responden telah mengalami kecederaan serius manakala Toh Kie Hung

('si mati') telah meninggal dunia. Plaintif/responden telah menyaman pentadbirani harta pusaka si mati di Mahkamah Sesyen di Sibu, Sarawak menuntut ganti rugi untuk kecederaan peribadi yang dialaminya akibat daripada kecuaian si mati dan memperoleh penghakiman selepas perbicaraan penuh. Penghakiman itu telah dikekalkan oleh Mahkamah Tinggi setelah rayuan dibuat dan plaintif/responden berhak dibayar sejumlah RM570,766.35 bersama faedah pada kadar yang ditetapkan dalam penghakiman yang mana harta pusaka si mati gagal membayar.

Plaintif/responden kemudian telah memfailkan guaman ini terhadap defendan/perayu, syarikat insurans sah yang telah pada 5 Januari 1995, mengeluarkan polisi insurans No SB94DY001063/MPT/ROO ('polisi tersebut') kepada si mati. Adalah kes plaintif bahawa polisi tersebut melindungi plaintif/responden kerana beliau merupakan 'a passenger carried by reason of or in pursuance of contract of employment'. Defendan/perayu telah menafikan liabiliti dan mengatakan bahawa plaintif/responden adalah, pada masa kemalangan itu, penumpang dalam kereta si mati yang telah dibawa oleh sebab atau menurut suatu kontrak pekerjaan.

Keseluruhan tindakan berkisarkan satu persoalan, iaitu sama ada plaintif/responden merupakan penumlang dalam kereta si mati oleh kerana atau menurut satu kontrak pekerjaan. Jika sedemikian, defendan/perayu mempunyai liabiliti untuk mematuhi penghakiman yang diperoleh oleh plaintif/responden terhadap harta pusaka si mati. Jika bukan, defendan/perayu tidak mempunyai tanggungjawab itu. Hakim perbicaraan menyebelahi plaintif/responden dan defendan/perayu telah merayu terhadap penemuan hakim perbicaraan tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Adalah undang-undang tetap bahawa kontrak pekerjaan yang dirujuk dalam klausa tersebut tidak terbatas kepada pkerjaan pengambil insurans yang diambil bekerja. Ia juga terpakai kepada sesiapa yang dibawa masuk menurut satu kontrak pekerjaan dengan majikan lain (see *Izzard v Universal Insurance* [1937] AC 733; *Tan Keng Hong & Anor v Fatimah binti Abdullah & Ors* [1974] 1 MLJ 156; *United Oriental Assurance Sdn Bhd v Lin Eng Yew* [1991] 3 MLJ 429 dan *Union Insurance (M) Sdn. Bhd. v Chan You Yuong* [1999] 1 MLJ 593). Kes-kes ini jelas menunjukkan bahawa kontrak pekerjaan yang dirujuk dalam klausa tidak terbatas kepada pekerjaan pengambil insurans. Adalah mungkin untuk seorang penumpang untuk terangkum dalam kalusa ini meskipun diambil bekerja oleh pihak ketiga (lihat perenggan 14).

(2) Mahkamah tidak mendapati apa-apa kesilapan dalam penemuan hakim perbicaraan yang bijaksana. Kes defendan adalah bahawa plaintif hanya menumpang kereta si mati dari Sibu. Namun defendan tidak memanggil saksi. Dengan itu, hanya terdapat satu versi keterangan di hadapan hakim perbicaraan yang bijaksana iaitu versi plaintif. Oleh demikian, tiada konflik keterangan dalam kes ini. Persoalan di hadapan hakim perbicaraan yang bijaksana adalah sama ada testimoni dua saksi yang dipanggil oleh plaintif memadai untuk plaintif membuktikan kesnya. Hakim perbicaraan yang bijaksana mendapati ia memadai (lihat perenggan 17).

(3) Mahkamah secara keseluruhannya bersetuju dengan alasan hakim perbicaraan yang bijaksana. Beliau telah meneliti testimoni lisan saksi-saksi plaintif dengan terperinci. Beliau mendapati versi saksi-saksi tersebut tentang kejadian itu dapat bertahan ujian sukat pemeriksaan balas. Beliau menerima keterangan mereka dan memberikan alasan-alasan berbuat demikian. Mahkamah tidak melihat alasan-alasannya dicemari dengan kurangnya penghargaan kehakiman terhadap keterangan yang dikemukakan di hadapannya. Beliau juga tidak melakukan salah arah yang ketara atau terkhilaf dalam keputusannya atau membuat inferens untuk menjustifikasikan campur tangan mahkamah ini. Oleh itu, tiada alasan untuk mengganggu penemuan fakta oleh hakim perbicaraan yang bijaksana itu (lihat perenggan 18).

(4) Kesimpulannya, mahkamah berpendapat penemuan hakim perbicaraan yang bijaksana bahawa plaintif pada masa kemalangan merupakan penumpang dalam kereta si mati oleh sebab atau menurut satu kontrak pekerjaan adalah penemuan fakta. Tiada kekurangan autoriti dalam menangani pendekatan apa mahkamah rayuan patut ambil apabila mengkaji semula penemuan fakta oleh mahkamah perbicaraan. Prinsip undang-undang yang tetap adalah tidak diingini di mana penemuan faktual mahkamah perbicaraan diganggu oleh mahkamah rayuan kecuali jika ia kelihatan penemuan tersebut jelas salah. Dan ia juga tidak diingini untuk berbuat demikian di mana keputusan yang tercapai, sebahagian besarnya, bergantung kepada kebolehpercayaan saksi-saksi dan tanggapan yang digambarkan oleh hakim perbicaraan yang telah melihat mereka dan menghakimi kejujuran dan ketepatan mereka (*China Airlines Ltd v Malta Air Corporation Sdn Bhd & Another Appeal* [1996] 3 CLJ 163). Mahkamah telah menggunakan prinsip sama dalam membuat keputusan rayuan ini (lihat perenggan 21).]

Notes

For cases on claims, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 238–239.

Cases referred to

China Airlines Ltd v Malta Air Corporation Sdn. Bhd. & Another Appeal [1996] 3 CLJ 163 (refd)

Izzard v Universal Insurance [1937] AC 733 (refd)

Tan Keng Hong & Anor v Fatimah binti Abdullah & Ors [1974] 1 MLJ 156 (refd)

United Oriental Assurance Sdn. Bhd. v Lin Eng Yew [1991] 3 MLJ 429 (refd)

Union Insurance (M) Sdn. Bhd. v Chan You Yuong [1999] 1 MLJ 593 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: Civil Suit No 22–77 of 1999 (High Court, Sibu)

Orlando Chua (TH Liew & Partners) for the appellants.
Robert Lau Hui Yew (Stephen Robert & Wong) for the first respondent.

Raus Sharif JCA (delivering judgment of the court):

[1] This is an appeal against the judgment of the High Court at Sibu allowing a claim by the plaintiff against the defendant pursuant to s 96(1) of the Road Transport Act 1987.

[2] On 20 November 2006, we dismissed the appeal. We now given our reasons. First, the relevant facts.

[3] On 5 August 1995, the plaintiff was travelling as a passenger in a car bearing registration QSA 8809 owned and driven by one Toh Kie Hung along the Bintulu-Sibu road. The car swerved off the road and plunged into a ravine. As a result, the plaintiff sustained serious injuries while Toh Kie Hung ('deceased'), died.

[4] The plaintiff brought an action against the administratrix of the estate of the deceased in the Session Court at Sibu, Sarawak claiming damages for personal injuries suffered by him as a result of negligence of the deceased in causing the accident.

[5] On 28 May 1999, the session court, after a full trial, granted judgment in favour of the plaintiff. The deceased's estate appealed to the High Court Sibu. Save for a minor variation, the judgment was upheld by the High Court. Hence, the plaintiff became entitled to be paid the sum of RM570,766.35 together with interest at the rates specified in the judgment.

[6] The deceased's estate failed to pay the judgment sum. The plaintiff then filed this suit against the defendant, as the car was insured with the defendant. The defendant, an authorised insurer, had on 5 January 1995, issued insurance policy No SB94DY001063/MPT/ROO ('the policy') to the deceased. The policy was to cover liability which may be incurred by the deceased in respect of death or bodily injury to any person caused by or arising from the use on the road of the car but excluded:

(i) liability arising from the death or bodily injury to any passenger being carried for hire or reward;

(ii) liability arising from any death or bodily injury to any person where such death or injury arises out of and in the course of employment of such person by the deceased;

(iii) liability arising from any death or bodily injury to any person (*other than a passenger carried by reason of or in pursuance of contract of employment*) being carried in or upon or entering or getting onto or alighting from the car (Emphasis added).

[7] It is the plaintiff's case that the policy covered the plaintiff as he was 'a passenger carried by reason of or in pursuance of contract of employment'. The defendant denied any liability and alleged that the plaintiff was, at the time of the accident,

a passenger in the car of the deceased being carried therein other than by reason of or in pursuance of a contract of employment.

[8] Thus, the entire action therefore turned on a sole issue, namely whether the plaintiff was a passenger in the deceased's car by reason of or in pursuance of a contract of employment. If he was, the defendant is liable to satisfy the judgment obtained by the plaintiff against the estate of the deceased. If he was not, the defendant would not be liable.

[9] At the trial two witnesses gave evidence for the plaintiff. The first witness was the plaintiff himself. His evidence may be summarised as follows. In 1995, the plaintiff was employed by Hicom United Leasing Sdn. Bhd. ('Hicom') as a mechanic at their office in Bintulu, Sarawak. Hicom is in the business of selling, leasing and servicing equipment such as generators, welding machines and pressure pumps. Sometime between 10 and 11 o'clock on the morning of 5 August 1995, which fell on Saturday, while the plaintiff was at his office at Bintulu, he received instruction from his manager Lim Tiong Hing ('PW2') to go to Stapang Sibu, to check on a high pressure pump. He was asked by PW2 to travel to Stapang as a passenger in the deceased's car as the deceased knew where the pump was located. The deceased at the material time was a salesman with a company called Scott & English. The plaintiff accordingly left Bintulu between 1pm to 2pm travelling as a passenger in the car driven by the deceased.

[10] PW2, was the other witness who gave evidence on behalf of the plaintiff. PW2 confirmed that he did instruct the plaintiff to follow the deceased to Stapang to service the pump. According to him, on 5 August 1995 the deceased had informed him that a high pressure pump, sold by Scott & English to a customer in Stapang was out of order, and wanted Hicom to carry out the services. PW2, accordingly instructed the plaintiff to do the job. According to PW2, he instructed the plaintiff to travel in the deceased's car because the deceased knew the location of the pump. PW2 in his evidence also revealed that Scott & English was the parent company of Hicom and Hicom would carry out services for equipment sold by Scott & English upon request by them.

[11] The defendant called no witness.

[12] The learned trial judge at the conclusion of the trial held that the plaintiff at the time of the accident was a passenger in the deceased's car by reason of or pursuant to a contract of employment. Accordingly, he ordered that there be judgment for the plaintiff in the terms of the prayers in the plaintiff's amended writ of summons and statement of claim.

[13] In this appeal, there are two aspects of the learned trial judge's decision which come under heavy criticism from the defendant. Firstly, the legal finding that the plaintiff need not work for the deceased's employer and travel in the car for the purpose. It suffice that he worked for some employer and traveled in the car pursuant to his contract of employment with that employer. Secondly, the factual finding that the plaintiff was in fact travelling pursuant to his contract of employment.

[14] The legal finding turn entirely on the meaning of the phase '… other than a passenger carried by reason of or in pursuance of contract of employment.' As rightly pointed out by the learned trial judge, the law on passenger liability in respect of a policy of insurance having an exclusion clause with similar wordings as in the present case had been discussed in several cases. It is settled law that the contract of employment referred to in the clause is not confined to the employment of the insured. It is also applicable to any person being carried in pursuance of a contract of employment with another employer (see *Izzard v Universal Insurance* [1937] AC 733; *Tan Keng Hong & Anor v Fatimah binti Abdullah & Ors* [1974] 1 MLJ 156; *United Oriental Assurance Sdn. Bhd. v Lin Eng Yew* [1991] 3 MLJ 429 and *Union Insurance (M) Sdn. Bhd. v Chan You Yuong* [1999] 1 MLJ 593). These cases clearly demonstrate that the contract of employment referred to in the clause is not confined to the employment of the insured. It is possible for a passenger to come within this clause even if employed by a third party.

[15] After having correctly stated the law, the learned trial judge made the following factual findings:

> On the day in question the plaintiff was being carried 'in pursuance of a contract of employment' because the evidence shows that it was a term of his contract of employment that whenever he was required to undertake jobs outside the office, the company as his employer would provide transportation for him to do so. With regard to the question whether the plaintiff was being so carried by 'reason of a contract of employment', the evidence shows that on the day in question the plaintiff was in the said vehicle as he had been instructed by his employer to travel as a passenger in the said vehicle and the company as his employer, was only able to give him that instruction by reason of there being the relationship of employer and employee between them by reason of contract of employment.

[16] It is the contention of the defendant that the learned trial judge erred in arriving at the above findings. In particular the defendant contended that the learned trial judge erred in the following respects:

(i) Erred in fact in finding that the plaintiff was required by his contract of employment with the employers, to go to Stapang Sibu in the absence of evidence.

(ii) Available evidence was not called. The learned trial judge did not make adverse findings against the plaintiff.

(iii) Erred in law in finding that the plaintiff was 'a passenger carried by reason of or pursuant of contract of employment'. The defendant contends that the plaintiff merely took a lift from Bintulu to Sibu. There was no evidence that the plaintiff was contractually obliged to go to Stapang Sibu to assist the deceased.

[17] With utmost respect and having read and re-read the judgment under appeal we do not detect any error on the findings of the learned trial judge. The defendant's case was that the plaintiff merely took a lift from the deceased's car to Sibu. But the defendant did not call any witness. Thus, there is only one version of evidence before the learned trial judge ie the plaintiff's version. Therefore, there is no conflict of evidence in this case. The question before the learned trial judge was whether the

testimony of the two witnesses called by the plaintiff is sufficient for the plaintiff to prove his case. The learned trial judge found it to be sufficient. He gave his reasons as follows:

> In evaluating the testimony of PW1 and PW2, I have looked at the whole of their evidence, including how their version of events withstood the acid test of cross-examination. To a large extent the efforts of the defendant in this case has been directed at trying to show through the cross-examination of PW1 and PW2, that the plaintiff was a passenger in Toh Kie Hung's car on 5th August, 1995 because Toh Kie Hung had offered the plaintiff a free lift back to Sibu after office hours on that day. If this was so, a relevant question to ask is: When did Toh Kie Hung make such an offer to the plaintiff? To me the following questions put to the plaintiff in his cross-examination and his answers to them were relevant in answering the question posed as well as to the case which the defendant was trying to make out regarding the plaintiff having accepted a free lift home from Toh Kie Hung on the day in question:
>
> Q: You told the Court that on the 5th August, 1995 at about sometime between 10 something to 11 something in the morning, you received instructions from your manager Mr Lim to go to Stapang to check on the pressure pump. Was there any service order issued by your company?
>
> A: No.
>
> Q: Can you recall how the instructions were conveyed to you?
>
> A: Orally.
>
> Q: Was Mr Toh Kie Hung with Mr Lim?
>
> A: Yes.
>
> Q: Do you know who made the request to your manager?
>
> A: Mr Toh Kie Hung.
>
> Q: You know Mr Toh Kie Hung very well?
>
> A: Yes.
>
> Q: Did he ever speak to you about the said pump before he spoke to the manager?
>
> A: No.
>
> The above evidence shows that before the plaintiff was instructed by PW2 to go with Toh Kie Hung to Stapang to service the pump, Toh Kie Hung had never spoken to the plaintiff about the pump. Nor was there any evidence before the Court to show or suggest that the plaintiff and Toh Kie Hung had been in some form of communication or contract with each other prior to the plaintiff being instructed by PW2, in the presence of Toh Kie Hung, to go to Stapang, with the later. When this evidence is viewed in the light of PW2's own testimony that he instructed the plaintiff to go to Stapang as a passenger in Toh Kie Hung's car because the plaintiff did not know where the pump was located, the defendant's assertion that the plaintiff was present in the said vehicle because the plaintiff had accepted Toh Kie Hung's offer of a free lift home to Sibu that day is not supported by the evidence which shows that there was no opportunity for Toh Kie Hung to make the offer of a free lift home and for the plaintiff to accept it before the plaintiff was instructed by Lim Tiong Hing to travel as a passenger in Toh Kie Hung's car.
>
> Quite apart from the above, there are also other pieces of evidence which give credence to the plaintiff's version of why he was present in the said vehicle. The plaintiff was, at the material time, the only trained mechanic in Hicom, Bintulu whose business consisted of

inter alia servicing pressure pumps. He was familiar with the model of the pump sold by Scott & English which required servicing because he had serviced and repaired such a pump before. There is also the evidence of Lim Tiong Hing that Hicom, being related companies, Hicom would service equipment sold by Scott & English only upon request by the later. Given the above evidence it is understandable that Toh Kie Hung should turn to PW2 and for PW2 to instruct the plaintiff in turn to go to Stapang to service the pump.

The defendant also submitted that PW2 had admitted that if the plaintiff had wanted to use the company car to follow behind Toh Kie Hung's car to where the pump was he could have done so. The suggestion here is that since the plaintiff could have used the company car if he wanted to, there was no need for the plaintiff to travel as a passenger in Toh Kie Hung's car. I find that this submission overlooks the evidence given by the plaintiff in cross-examination that he did try to inquire from Toh Kie Hung where the pump was located and its address, but was informed only that it was in the Stapang area. So even though it was possible, theoretically speaking, for the plaintiff to follow behind Toh Kie Hung in the company car, I do not think PW2 can be faulted for not having instructed the plaintiff to do so as it would not have been practical to do so given PW2's explanation, when he was pressed in cross-examination as to why he had not done so, that he did not instruct the plaintiff to use the company car to follow Toh Kie Hung to the customer's premises because the plaintiff did not know the location and it was 'a long distance', meaning that since it is a long distance between Bintulu and Stapang, there was a possibility of them losing each other along the way, thereby wasting time. I find this explanation reasonable and acceptable.

[18] We are entirely in agreement with the learned trial judge's reasoning. He had gone through the oral testimony of the plaintiff's witnesses in detail. He found the witnesses' version of the events had withstood the acid test of cross-examination. He accepted their evidence and gave his reasons for doing so. We do not see his reasoning in any way tainted with lack of judicial appreciation of the evidence placed before him. Nor did he commit any fundamental misdirection or was wrong in his conclusion or inference to justify this court's intervention. Thus, we have no reason to disturb the findings of fact by the learned trial judge.

[19] It is our judgment, on the facts of this case, the plaintiff comes within the exception of the policy. On the fateful day he was travelling to a place of work, in the car of the deceased at the instruction of his manager. His term of employment required him to travel outstation, and sometimes in a client's car, to carry work as a mechanic. He was travelling in such capacity at the time of the accident. In law he was a passenger in the deceased's car by reason of or in pursuance of a contract of employment.

[20] We are also in agreement with the learned trial judge that no adverse inference could be made against the plaintiff for not calling a witness called Albert Ong. Albert Ong was the other passenger in the deceased's car. According to the defendant, Albert Ong would have been able to have shed some light on the truth of the matter and should have been called as a witness by the plaintiff. The learned trial judge addressed the issue as follows:

I do not think there is anything suspicious about Albert Ong not being called as a witness. There is no evidence that he was present when PW2 instructed the plaintiff in the presence of Toh Kie Hung to go to service the pump and to go in Toh Kie Hung's vehicle for the

purpose. Besides, the plaintiff said Toh Kie Hung picked Albert Ong up first before coming to pick him up before the journey. And there is no evidence before the Court that the plaintiff and Albert Ong had been in communication with each other before the plaintiff was picked up. So how much light could Albert Ong be expected to shed on the purpose of plaintiff's presence in the said car? In my view, nothing material.

It is our judgment that the learned trial judge was right in not drawing an adverse inference against the plaintiff under s 114(g) of the Evidence Act 1950 in not calling Albert Ong. On the facts of this case s 114(g) of the Evidence Act 1950 has no application.

[21] In conclusion, we are of the view that the findings of the learned trial judge that the plaintiff at the time of the accident was a passenger in the deceased's car by reason of or pursuant to a contract of employment are findings of facts. There is no dearth of authority dealing with the approach what the appellate court should take when reviewing the findings of facts by the trial court. The settled principle of law is that, it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appears that these findings are clearly wrong. And it is even more undesirable to do so where the conclusion reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the trial judge who has seen them and judged their honesty and accuracy (see Federal Court case of *China Airlines Ltd v Malta Air Corporation Sdn. Bhd. & Another Appeal* [1996] 3 CLJ 163). We adopt the same principle in deciding this appeal.

[22] For the above reasons we unanimously dismissed the defendant's appeal with costs. We also ordered that the deposit is to be paid to the plaintiff to account of taxed costs.

Reported by Navit Kaur Randhawa